

**Commonwealth of Kentucky
Workers' Compensation Board**

OPINION ENTERED: **March 31, 2017**

CLAIM NO. 200594473

PUBLISHERS PRINTING CO LLC

PETITIONER

VS.

**APPEAL FROM HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE**

DAVID VERGARA
SETON MEDICAL CENTER, WILLIAMSON
HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING**

* * * * *

BEFORE: ALVEY, Chairman, STIVERS and RECHTER, Members.

RECHTER, Member. Publishers Printing Co. LLC ("Publishers Printing") appeals from the October 3, 2016 Opinion and Order and the December 1, 2016 Order rendered by Hon. Chris Davis, Administrative Law Judge ("ALJ") in a post-award medical dispute. The ALJ determined Publishers Printing is responsible for the payment of David Vergara's ("Vergara")

surgery, hospitalization and x-rays. On appeal, Publishers Printing argues Vergara failed to meet his burden of proving the contested expenses are work-related, the ALJ erroneously relied upon the principle of *res judicata*, and the ALJ's decision was an abuse of discretion. For the reasons set forth herein, we affirm.

Vergara filed a claim on December 12, 2006 alleging injuries to his head, neck, lower back, and depression/anxiety, as a result of a work-related injury on January 26, 2005. Vergara's claim was resolved by Opinion, Award and Order rendered January 17, 2008 by Administrative Law Judge, J. Landon Overfield ("ALJ Overfield"), who found Vergara permanently totally disabled with no pre-existing active occupational disability. Publishers Printing appealed, though the appeal was dismissed prior to consideration because a post-award settlement agreement was reached. The parties agreed Vergara is permanently totally disabled, but the agreement included a 34% carve-out for pre-existing active occupational disability. Medical expenses for the cervical and lumbar spine remained open.

As referenced in the settlement agreement, Vergara underwent an L5-S1 transforaminal lumbar interbody fusion on February 9, 2007. On May 21, 2007, he underwent an anterior

cervical discectomy and fusion at the C5/6 level. However, his neck and back pain persisted. The medical records of Dr. Rinkoo Aggarwal, who began treating Vergara in April 2005, were submitted in this medical fee dispute. In an April 17, 2009 office note, Vergara reported neck and back pain, and radiating pain in his buttocks and thighs. Dr. Aggarwal noted a history of the 2005 work-related injury, and that he had treated his neck and back pain with medications and epidural steroid injections. Vergara continued to treat with Dr. Aggarwal for neck, back pain and thigh paresthesia until June, 2014, when Vergara moved to Texas.

In Texas, Vergara visited Dr. Richard Male on September 22, 2014 for an evaluation of his neck and low back. Vergara reported his previous lumbar surgery had failed, and the procedure was repeated by Dr. Frank Castro in 2014, though no surgical or treatment records were offered into evidence in this medical fee dispute. Dr. Male diagnosed cervicalgia, neck pain and degeneration of intervertebral disc, and chronic low back pain. He referred Vergara to physical therapy. Treatment records indicate Vergara continued to periodically visit Dr. Male for neck and low back pain until June 2, 2015. Dr. Male monitored Vergara's pain medications

and steroid injections, and referred him to Integrated Pain Associates ("IPA") for pain management.

On April 20, 2015, Dr. Eric Jenkins of IPA evaluated Vergara and diagnosed low back pain, lumbar radiculopathy on the left, lumbar failed back surgery syndrome (cervical), cervicalgia, and cervical radiculopathy. Dr. Jenkins ordered a cervical and lumbar MRI which were conducted on May 27, 2015. The cervical MRI revealed central canal stenosis at C3-4 with cord compression and mild myelomalacia of the cord, large extruded disc at C6-7 with central canal stenosis and cord compression, extensive cervical spondylosis, facet arthrosis, and neural foraminal narrowing. The lumbar MRI revealed postsurgical changes from L4 to S1, extensive lumbar spondylosis, and facet arthrosis. When Vergara returned to IPA on June 1, 2015, he was seen by Dr. Benjamin P. Lowry. Dr. Lowry ordered epidural steroid injections and referred Vergara to a spine surgeon for possible cervical decompression at C3-4 and for severe spinal stenosis at L2-3 and L3-4. Dr. Lowry again recommended steroid epidural injections, the necessity of which was sent to utilization review.

Dr. Glenn Babus conducted the utilization review on June 22, 2015 regarding lumbar epidural steroid injections,

and another review on July 28, 2015 regarding left SI joint injections. He determined the requests for epidural steroid injections were not medically necessary. He further opined the SI joint injections are not medically necessary.

In a September 17, 2015 letter, Dr. Lowry noted Vergara complained of ongoing cervical spine pain radiating into the upper extremities resulting from his work injury. A cervical epidural steroid injection had produced a 50% reduction in pain. Dr. Lowry felt additional injections would alleviate Vergara's neck pain.

On August 3, 2015, Publishers Printing filed a Form 112 and motion to reopen to contest sacroiliac injections. It later amended its Form 112 to contest additional sacroiliac injections, hospital charges related to edema, rhabdomyolysis, and lumbar decompression surgery performed on January 26, 2016. In support of its motion to reopen, Publishers Printing submitted the undated report of Dr. William Nemeth who conducted an independent medical evaluation ("IME").

Dr. Nemeth reviewed Vergara's medical records, but his medical report indicates he did not conduct a physical examination. He noted Vergara's documented complaints of pain in his buttocks, arm, shoulder, and hand with tingling

in his hands to Dr. Nemeth. Vergara also reported difficulty urinating and defecating. Dr. Nemeth concluded the "only work-related diagnosis would be cervical strain, lumbosacral strain and mild post-concussive syndrome." He related the diagnoses of cervical and lumbar spondylosis and stenosis to pre-existing degenerative conditions. Dr. Nemeth opined the sacroiliac injections, lumbar injections and hospital treatment for edema and rhabdomyolysis are not related to the work injury.

Meanwhile, Vergara was referred to Dr. Mustasim N. Rumi for a surgical consultation, and whose medical records were submitted. Dr. Rumi recorded a history that Vergara's problems began ten years ago with a work-related injury. Despite surgery in 2014, Vergara reported his low back pain progressively worsened over the previous seven months, along with increasing weakness of the lower extremities and claudication. He had fallen several times in the previous four weeks despite use of a walker. Dr. Rumi diagnosed spinal stenosis in the lumbar region and chronic pain syndrome. On January 26, 2016, Dr. Rumi performed lumbar surgery consisting of wide decompressive laminectomy, partial medial facetectomy, foramenotomy L1-L2-L3 for decompression of the nerve roots, and L3-4 laminectomy for removal of intracanal,

extradural mass. His post-operative diagnoses were lumbar stenosis, neurological deficit, intracanal extradural mass at L3-4 and lumbar stenosis at L1-2.

Records from Seton Medical Center indicate Vergara was admitted on January 21, 2016 for back pain, progressive lower extremity weakness, a history of falls, and bowel and bladder issues. A CT scan revealed an intracanal lesion at L3 extending caudally and compressing the left sided thecal sac and left and central-at the L3-4 level. A January 26, 2016 lumbar MRI was interpreted by Dr. Nitasha Klar. Dr. Klar made three findings: a multilevel severe spinal canal stenosis at L1-2 through L3-4 with severe impingement of the cauda equina nerve roots; a large partially calcified disc herniation at L3-4 with near complete effacement of the cross-section of the spinal canal; and left neural-foraminal stenosis at L3-4 with likely impingement of the exiting left L3 nerve root. Dr. Klar also noted edema in the L3-4 disc space and adjacent left psoas muscle. Vergara was noted as status post anterior and posterior spinal fusion at L4-5 and L5-S1. A CT scan of the lumbar spine found no acute injury. Vergara's diagnoses were low back pain, lumbar radiculopathy, neurogenic claudication with worsening function and weakness, lumbar spondylosis, disc degeneration and stenosis, and

fusion at L5-S1 with possible pseudoarthrosis at the L4-5 level.

Following the surgery, Dr. Nemeth reviewed Vergara's additional medical reports and submitted a June 5, 2016 supplemental report. He opined the lumbar decompression procedure was performed to relieve degenerative, congenital spinal stenosis. To support this conclusion, Dr. Nemeth points to a mass removed from the spinal cord during surgery, which he opined is consistent with extruded and degenerative disc material. Dr. Nemeth stated, "In other words the spinal mass and the need for surgery does not relate to the prior lumbar spine injury which was a simple lumbosacral strain injury." Instead, he attributed the surgery to degenerative spondylosis.

The ALJ's findings relevant to the appeal are as follows:

On January 17, 2008 Judge J. Landon Overfield found, via Opinion, Order and Award, among other things, that the Plaintiff had had a cervical and lumbar work-related injury that necessitated lumbar surgeries. He did this through a combination of findings including findings of cervical and lumbar injuries and medical fee disputes in favor of the Plaintiff. As such Judge Overfield's findings that the Plaintiff has more than a strain are *res judicata*.

As such any statement by Dr. Nemeth that the work-related injury is a cervical and/or lumbar strain is a nullity. It cannot overcome a *res judicata* finding.

Dr. Rumi has stated that the surgery he did, along with associated diagnostic testing, is work-related. This includes the disputed x-rays and the surgery.

As such there is evidence, from Dr. Rumi, that the surgery and x-rays are work-related. There is a *res judicata* Opinion that the Plaintiff's injury is not a strain/sprain. The evidence from Dr. Nemeth regarding the diagnosis of the work injury is null. The surgery as done by Dr. Rumi, and the associated x-rays, are work-related.

The diagnostic testing ordered by Dr. Rumi showed a mass that was causing radiculopathy. Dr. Rumi found radiculopathy. The Plaintiff had had a series of injections and conservative care from Dr. Male. Drs. Nemeth and Balbus [sic] statements that the Plaintiff had an insufficient course of conservative treatment prior to surgery are subjective and do not demonstrate what is "insufficient" versus "sufficient". I accept the Plaintiff was in pain and debilitated.

The surgery and x-rays by Dr. Rumi were reasonable and necessary.

Publishers Printing filed a petition for reconsideration requesting additional findings regarding the treatment for edema and rhabdomyolysis, in addition to the arguments it now raises on appeal. In his order ruling on

the petition for reconsideration, the ALJ noted a lack of contradictory evidence and found the edema and rhabdomyolysis conditions non-compensable. The ALJ overruled arguments regarding Dr. Nemeth's opinions as an impermissible re-argument of the facts and merits.

On appeal, Publishers Printing argues Vergara failed to meet his burden of proving the contested treatment is work-related. In a somewhat related argument, it asserts the ALJ improperly applied the doctrine of *res judicata* to this claim. We can address these two arguments simultaneously.

In a post-award medical fee dispute, the burden of proof and risk of non-persuasion with respect to the reasonableness and necessity of medical treatment falls on the employer. National Pizza Company v Curry, 802 S.W.2d 949 (Ky. App. 1991). Vergara was required to set forth medical proof showing the contested treatment was causally related to the work injury. Because Vergara was successful in establishing work-relatedness, the question on appeal is whether the evidence compels a contrary result.

Furthermore, we note the concept of *res judicata* bars the re-litigation of a cause of action previously adjudicated between the same parties. It requires a final

judgment, identity of subject matter and mutuality of parties. BTC Leasing Inc. v. Martin, 685 S.W.2d 191 (Ky. App. 1984). A settlement agreement carries the force and effect of a judgement.

In his January 17, 2008 Opinion, ALJ Overfield determined Vergara suffered a lumbar injury requiring surgery which, combined with the effects of the cervical injury, rendered him permanently totally disabled. The approved settlement agreement noted Vergara's L5/S1 discectomy and fusion, and awarded future medical benefits for a lumbar injury. Dr. Nemeth's first assessment states Vergara's "work-related injuries would be simply cervical strain and lumbar strain." In his supplemental report, he relates the surgery to Vergara's "widespread stenosis at multiple levels", and again characterizes the work injury as a "simple lumbosacral strain injury." Publishers Printing is not permitted, at this stage, to litigate whether Vergara suffered a work-related injury to his lumbar spine. The ALJ was well within his role as fact-finder in rejecting Dr. Nemeth's opinion on that basis. Contrary to Publishers Printing's assertions, the ALJ did not find that *res judicata* bars the reopening for a medical fee dispute. Rather, he limited the application to the finding regarding the nature

of the work injury and its effect on the weight to be given to Dr. Nemeth's opinion which was premised on a view of facts contrary to the previous determination. Therefore, the ALJ properly applied the principle of *res judicata* to this claim.

Moreover, we disagree that Kingery v. Sumitomo Electric Wiring, 481 S.W.3d 492 (Ky. 2016) requires the ALJ to adopt Dr. Nemeth's medical opinion, as Publishers Printing argues. In Kingery, the ALJ erred in concluding an uncontradicted medical opinion was sufficiently refuted by lay testimony. Here, the ALJ offered a reasonable and cogent explanation for rejecting Dr. Nemeth's medical opinion; that is, because it was premised upon a diagnosis that was already rejected by ALJ Overfield regarding the nature of Vergara's original injury.

Furthermore, we disagree with Publishers Printing's characterization of the proof. It is true Dr. Rumi took a history from Vergara regarding low back pain, which began ten years prior to the work accident. The ALJ interpreted this statement as a medical opinion regarding causation, which Publishers Printing challenges. Even if we accept its position *arguendo*, the proof nonetheless does not compel a finding in its favor. ALJ Overfield determined Vergara's 2007 lumbar surgery was necessitated by his work injury.

Numerous medical records state Vergara's 2014 lumbar surgery was the result of a failure of the first procedure, and Publishers Printing offered no proof to contest this assertion. Treatment records from Drs. Aggarwal, Male and Rumi, in addition to IPA's records, document continual treatment for lumbar pain since 2005, and prior to the first lumbar surgery. When viewed in its totality, we cannot conclude the proof compels a finding the contested treatment is not work-related.

We find no abuse of discretion on the part of the ALJ. Abuse of discretion has been defined, in relation to the exercise of judicial power, which "implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision." Kentucky Nat. Park Commission, ex rel. Comm., v. Russell, 191 S.W.2d 214 (Ky. 1945). The ALJ considered the relevant evidence and the prior decision in this matter. He did not misapply the doctrine of *res judicata*. As noted above, he had a legitimate basis to reject the opinion of Dr. Nemeth. The record contained substantial evidence to support the ALJ's conclusions. Based upon the totality of the evidence, the ALJ acted within his discretion to determine which evidence to rely upon, and it cannot be said the ALJ's conclusions are

so unreasonable as to compel a different result. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

Accordingly, the October 3, 2016 Opinion and Order and the December 1, 2016 Order rendered by Hon. Chris Davis, Administrative Law Judge are hereby **AFFIRMED**.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON. STEVEN KIMBLER
HON. RONALD J. POHL
3292 EAGLE VIEW LN #350
LEXINGTON, KY 40509

COUNSEL FOR RESPONDENT:

HON. JAMES VARELLAS
249 W SHORT ST #201
LEXINGTON, KY 40507

SETON MEDICAL CENTER, WILLIAMSON, RESPONDENT:

SETON MEDICAL CENTER, WILLIAMSON
DR. MUSTASIM RUMI, REDFERN, SOILEAI, SEDIE & CARSNER
201 SETON PARKWAY
ROUND ROCK, TX 78665

ADMINISTRATIVE LAW JUDGE:

HON CHRIS DAVIS
PREVENTION PARK
657 CHAMBERLIN AVENUE
FRANKFORT, KY 40601